



U.S. Department of Justice

DOJ # 90-11-3-215

Washington, D.C. 20530

April 4, 1995

VIA FEDERAL EXPRESS

Mr. Jeffrey Apperson, Clerk
United States District Court
Western District of Kentucky
501 West Broadway, Room 231
Louisville, KY 40202

Re: United States v. Hardy, et al, No. C90-0695-L(J)

Dear Mr. Apperson:

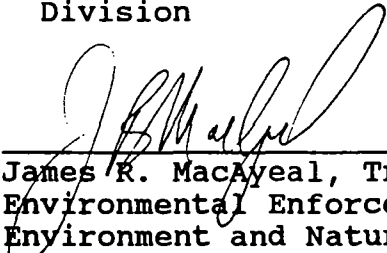
Enclosed for filing is an original and several copies of the United States' Motion in Limine for Judicial Notice and for Application of Collateral Estoppel and a supporting memorandum of law. Please file the originals and any required copies and return the remaining file-stamped copies to me in the enclosed self-addressed envelope.

Thank you for your assistance.

Sincerely,

Assistant Attorney General
Environment & Natural Resources
Division

By:


James R. MacAyeal, Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 616-8777

cc: Mark Feather (w/enclosures)



10875957

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	Civil Action Nos. 90-0695-L(J)
)	90-0792-L(J)
BEN HARDY, et al.,)	
)	
Defendants.)	
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UNITED STATES' MOTION IN LIMINE FOR
JUDICIAL NOTICE OF CERTAIN COURT RECORDS
AND FOR APPLICATION OF COLLATERAL ESTOPPEL

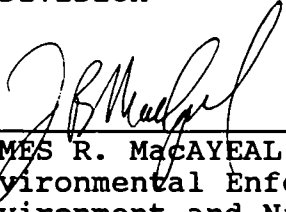
Plaintiff the United States of America, by its attorneys, moves for judicial notice of certain court records and for the application of collateral estoppel on the basis of such court records. In support of its motion, the United States respectfully submits the accompanying Memorandum of Law in Support of the United States' Motion in Limine for Judicial Notice of Certain Court Records and for Application of Collateral Estoppel.

WHEREFORE, the United States respectfully requests that this Court take judicial notice of the court records attached the Memorandum of Law in Support of the United States' Motion in Limine for Judicial Notice of Certain Court Records and for Application of Collateral Estoppel and determine that defendants may not relitigate the matters previously decided by KDNREP and the Franklin County Court as set forth in those records.

Dated: April 4, 1995

Assistant Attorney General
Environment & Natural Resources
Division

By:


JAMES R. MacAYEAL, Trial Attorney
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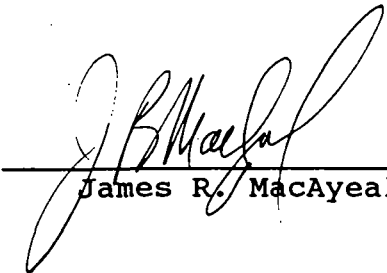
OF COUNSEL:

ROBERT CAPLAN
Assistant Regional Counsel
Environmental Protection Agency, Region IV

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 4th day of April 1995, he caused a copies of the foregoing to be served by depositing same in the U.S. Mails, in a properly addressed envelope with postage prepaid, to:

Mark R. Feather, Esq.
Brown, Todd & Heyburn
3200 Providian Center
Louisville, KY 40202-1087



James R. MacAyeal

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	Civil Action Nos. 90-0695-L(J)
)	90-0792-L(J)
BEN HARDY, et al.,)	
)	
Defendants.)	
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MEMORANDUM OF LAW IN SUPPORT OF
THE UNITED STATES' MOTION IN LIMINE FOR
JUDICIAL NOTICE OF CERTAIN COURT RECORDS
AND FOR APPLICATION OF COLLATERAL ESTOPPEL

Plaintiff the United States of America, by its attorneys, respectfully submits this memorandum of law in support of its motion for judicial notice of certain court records and for the application of collateral estoppel on the basis of such court records.

INTRODUCTION

On April 2, 1980, the Kentucky Department for Natural Resources and Environmental Protection ("KDNREP") issued an Order to Abate and Alleviate to J.H. Realty, Inc. and The Hofgesang Foundation, Inc. KDNREP had conducted an investigation and found that numerous 55 gallon drums containing hazardous chemical waste materials were present on property owned by both J.H. Realty, Inc. and The Hofgesang Foundation, Inc. and that many drums were leaking their contents. KDNREP also found that J.H. Realty, Inc. and The Hofgesang Foundation, Inc. had failed to exercise ordinary care with respect to the drums. On April 11, 1980, a KDNREP Hearing Officer gave J.H. Realty, Inc. and The Hofgesang

Foundation, Inc. an opportunity to present evidence to contradict the findings in the order. Ben B. Hardy appeared on behalf of the respondents and "chose to offer no proof whatever that the conditions complained of in the Secretary's Order to Abate and Alleviate did not exist." Report of Hearing Officer, at 3. KDNREP, however, introduced evidence at the hearing to substantiate its findings in the Order to Abate and Alleviate. The Hearing Officer found that evidence introduced at the hearing corroborated the findings in the Order to Abate and Alleviate. Report of Hearing Officer, at 3. On June 12, 1980, KDNREP issued an order, based on the findings of the Hearing Officer, that the Order to Abate and Alleviate should remain in full force and effect. KDNREP then filed a complaint on August 5, 1980 in Franklin Circuit Court to enforce the June 12, 1980 order, and the Franklin Circuit Court entered summary judgment against the defendants, adopting the KDNREP order of June 12, 1980.

The United States requests that this Court take judicial notice of the court records and rule that J.H. Realty, Inc. and The Hofgesang Foundation, Inc. are collaterally estopped from relitigating the matters determined by KDNREP and the Franklin Circuit Court.

ARGUMENT

I. THIS COURT MAY TAKE JUDICIAL NOTICE OF THE RECORDS FROM KDNREP AND THE FRANKLIN CIRCUIT COURT.

Federal courts may take judicial notice of court records from state courts. See Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Taylor v. Armontrout, 877 F.2d 726,

726 n. 2 (8th Cir. 1989); Sinclair v. Turner, 447 F.2d 1158, 1160 (10th Cir. 1971), cert. denied, 405 U.S. 1048 (1972); United States ex. rel. Collins v. Ashe, 90 F. Supp. 463, 464 (W.D. Pa. 1950). In fact, the "most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." 21 C. Wright & K. Graham, Federal Practice and Procedure, § 5106, at 505 (1977).

The United States requests that the Court take judicial notice of the attached court records from the Franklin County Circuit Court and the Kentucky Department for Natural Resources and Environmental Protection:

a. The KDNREP Order to Abate and Alleviate issued to J.H. Realty, Inc. and The Hofgesang Foundation, Inc., attached as Exhibit A.

b. The report of the KDNREP Hearing Officer in connection with the Order to Abate and Alleviate issued to J. H. Realty, Inc. and The Hofgesang Foundation, Inc. attached as Exhibit B.

c. The June 12, 1980 KDNREP Order based on the Report of the Hearing Officer, continuing in full force and effect the Order to Abate and Alleviate, attached as Exhibit C.

d. The complaint filed by KDNREP to enforce the Order to Abate and Alleviate (without exhibits), attached as Exhibit D.

e. A summary judgment order entered by the Franklin Circuit Court relating to the KDNREP Order to Abate and Alleviate issued to J.H. Realty, Inc. and The Hofgesang Foundation, Inc., attached as Exhibit E.

The United States has not submitted certified copies of all the attached pleadings, but defendants were participants in the proceedings and received the pleadings at that time. The United States has served a request to admit the authenticity of the documents on defendants. If defendants object to the authenticity of the documents attached hereto, the United States will promptly obtain certified copies and provide them to the Court.

II. DEFENDANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING WHAT WAS PREVIOUSLY DETERMINED BY KDNREP AND THE FRANKLIN CIRCUIT COURT.

Pursuant to the doctrine of collateral estoppel, defendants should be precluded from relitigating the matters decided by KDNREP and the Franklin County Circuit Court. The doctrine of collateral estoppel, or issue preclusion, provides that once a party to a proceeding has had a full and fair opportunity to litigate an issue that was finally determined, that party may not relitigate the issue in a subsequent proceeding. See Parklane Hosiery v. Shore, 439 U.S. 322, 326-33 (1979); Montana v. United States, 440 U.S. 147, 153-54 (1979); United States v. Sandoz Pharmaceuticals Corp., 894 F.2d 825, 826-27 (6th Cir.), cert. denied, 498 U.S. 810 (1990); Olchowik v. Sheet Metal Workers Int'l Ass'n, 875 F.2d 555, 557 (6th Cir. 1989). When an administrative agency acts in a judicial capacity and resolves disputed issues properly before it that the parties have had an adequate opportunity to litigate, courts have not hesitated to apply the doctrine of collateral estoppel to preclude

relitigation of matters already decided. Bowen v. United States, 570 F.2d 1311, 1321-23 (7th Cir. 1978); Olchowik v. Sheet Metal Workers Int'l Ass'n, 875 F.2d 555, 557 (6th Cir. 1989).

The test for determining whether the doctrine of collateral estoppel or issue preclusion applies involves analysis of three factors: (1) whether the issue is identical to that actually decided by another decisionmaker; (2) whether the issue was necessary to the earlier judgment; and (3) whether the party against whom preclusion would operate had a full and fair opportunity to litigate the issue. Olchowik v. Sheet Metal Workers Int'l Ass'n, 875 F.2d 555, 557 (6th Cir. 1989).

To the extent that Kentucky law governs the preclusive effect of a Kentucky judgment in this context¹, the law of Kentucky is the same. See May v. Oldfield, 698 F. Supp. 124, 125-26 (E.D. Ky. 1988); Sedley v. City of West Buechel, 461 S.W.2d 556, 559 (Ky. 1970).

In the present case, many of the issues relevant to defendants' claimed third party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), are identical to those actually decided in the Kentucky administrative proceeding. Under defendants' claimed third party defense, a defendant must show, among other things, that "the real property on which the facility concerned is located was acquired by the defendant after

¹ See Kaufman v. BDO Seidman, 984 F.2d 182, 184 & n.4 (6th Cir. 1993); Leaman v. Ohio Dept. of Mental Retardation, 825 F.2d 946, 964 (6th Cir. 1987), cert. denied, 487 U.S. 1204 (1988) (Merritt, J., dissenting).

the disposal or placement of hazardous substances on, in, or at the facility," and defendant must show that "(a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3).

The factual determinations from the Kentucky proceeding relevant to the third party defense are that the drums were present, that they contained hazardous substances, that they were leaking, and that they posed an environmental hazard. This not only shows that there was disposal during the time defendants owned the Landfill², but also that defendants did not exercise due care or take appropriate precautions as required by the defense. Indeed, the finding that defendants did not exercise ordinary care is fatal to defendants' third party defense.

The findings in the Kentucky proceeding were also necessary to the judgment. In issuing the administrative order, KDNREP

² "Disposal" is defined pursuant to 42 U.S.C. § 9601(29), to have the meaning set forth in the Solid Waste Disposal Act, 42 U.S.C. § 6903. The term is there defined to include "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3) (emphasis added); see Nurad, Inc. v. Wm. E. Hooper & Sons Co., 966 F.2d 837, 844-45 (4th Cir. 1992), cert. denied, 113 S.Ct. 377 (1992); see also Reading Co. v. Philadelphia, 36 Env't. Rep. Cas. 1129, 1142 (E.D. Pa. 1992); Emhart Industries v. Duracell International, Inc., 665 F. Supp. 549, 574 (M.D. Tenn. 1987).

relied on KRS 224.10-410, previously, KRS 224.071, which provides that the secretary may order a person to "discontinue, abate, or alleviate" a condition or activity that "presents a danger to the health or welfare of the people of the state or results in or is likely to result in damage to natural resources, and relates to the prevention and abatement powers of the secretary" when it "appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided." KRS 224.10-410 also provides that "as soon as possible thereafter, not to exceed ten (10) days, the secretary shall provide the person or combination of persons an opportunity to be heard and to present proof that such condition or activity does not violate the provisions of this section." KRS 224.10-410.

Although KRS 224.10-410 speaks in terms of protecting the health or welfare of the people of the state and natural resources, the statute does not specify the elements that must guide a court in granting injunctive relief. The annotated statutes, however, note as a collateral reference an A.L.R. article entitled: "Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance" 40 A.L.R.3d 601. This article makes clear that courts must weigh equities between the defendant, the plaintiff and the public when considering injunctive relief such as that called for in KRS 224.10-410. *Id.* at II, § 3, at 611-12. Moreover, Kentucky courts have made clear that the negligence vel non of a defendant

is a factor that must be considered in determining whether there is a nuisance as well as in fashioning an appropriate injunctive remedy.³

KDNREP clearly made findings of fact that the drums were leaking hazardous substances in order to prove the statutory element of a hazard to the public or to the environment. This was a necessary finding. It also made a finding that defendants failed to exercise ordinary care. Although KDNREP did not expressly state why it made this finding, it appears clear that it was necessary since negligence of the defendants would be a factor relevant either to finding that the condition was not reasonable or that injunctive relief was appropriate. See Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 758-59 (Ky. 1965) (negligence relevant to nuisance injunctive remedy, i.e., "reasonable remediability of the condition"); Louisville Refining Company v. Mudd, 339 S.W.2d 181, 186 (Ky. 1960) (negligence is relevant in determining existence of nuisance; relevant to issue of overall inequity).

³ See, e.g., Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 758-59 (1965) (negligence relevant to nuisance injunctive remedy, i.e., "reasonable remediability of the condition"); Louisville and Jefferson County Air Board v. Porter, 397 S.W.2d 146 (Ky. 1965) (nonnegligence is important factor in determining whether there is a nuisance); Louisville Refining Company v. Mudd, 339 S.W.2d 181, 186 (Ky. 1960) (negligence is relevant in determining existence of nuisance; relevant to issue of overall inequity); compare Commonwealth ex rel. Dept. of Fish and Wildlife Resources v. Mayer, 357 S.W.2d 879, 881 (Ky. 1962) (in absence of negligence no liability for legitimate and reasonable use of land).

The final requirement for the application of collateral estoppel, that defendants had a full and fair opportunity to litigate the issues, is also satisfied. The KDNREP Hearing Officer conducted a statutorily required evidentiary hearing to determine whether there was evidence to support the KDNREP Order to Abate and Alleviate, and made careful findings of fact. The Hearing Officer found that 350 to 500 55 gallon drums were situated at the Lee's Lane Landfill and that well over half were not empty. Report of Hearing Officer, at 3. He also found that many of the barrels were punctured and liquids were leaking from the barrels. Report of Hearing Officer, at 3. A random sampling of the contents of the drums showed that the barrels contained, among other things, ignitive wastes as defined by 401 KAR 2:051 E (2)(c), non-halogenated solvents, benzene, 2,4-dimethylphenal ethylbenzene and toluene. Report of Hearing Officer, at 3. The Hearing Officer also found that evidence corroborated "each of the claims and findings set forth in the Order to Abate and Alleviate," which would include the finding that "[o]rdinary care is not being exercised to protect the barrels or the former landfill site from the detrimental and degrading effects of the elements or flooding by the Ohio River." Report of Hearing Officer, at 2-3. Ben B. Hardy appeared on behalf of the respondents and "chose to offer no proof whatever that the conditions complained of in the Secretary's Order to Abate and Alleviate did not exist." Report of Hearing Officer, at 3. Defendants had an opportunity to present evidence, but had none

to present. There is no need to waste judicial resources by relitigating what was fully litigated fifteen years ago.


CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court take judicial notice of the attached court records and determine that defendants may not relitigate the matters previously decided by KDNREP and the Franklin County Court.

Dated: April 4, 1995

Assistant Attorney General
Environment & Natural Resources
Division

By:


JAMES R. MacAYEAL, Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
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United States Department of Justice
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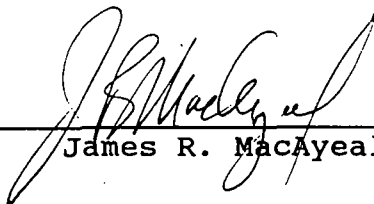
OF COUNSEL:

ROBERT CAPLAN
Assistant Regional Counsel
Environmental Protection Agency, Region IV

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 4th day of April 1995, he caused a copies of the foregoing to be served by depositing same in the U.S. Mails, in a properly addressed envelope with postage prepaid, to:

Mark R. Feather, Esq.
Brown, Todd & Heyburn
3200 Providian Center
Louisville, KY 40202-1087


James R. MacAyeal

FILED

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

APR 2 1980
GENERAL COUNSEL
DNREP

IN THE MATTER OF: The Lee's Lane Landfill Area
Lee's Lane
Jefferson County, Kentucky

SERVE: Ben B. Hardy
J H Realty, Inc.
209 South Fifth Street
Louisville, Kentucky 40202

Ben B. Hardy
Hofgesang Foundation, Inc.
209 S. Fifth Street
Louisville, Kentucky 40202

* * * * *



ORDER TO ABATE AND ALLEVIATE

Pursuant to the authority granted to the Secretary of the Department for Natural Resources and Environmental Protection by KRS 224.033 and 224.071, and after investigation and on information and the recommendation of the Bureau of Environmental Protection, the Secretary hereby finds that numerous 55 gallon drums of chemical waste material have been discovered on the riverfront edge of property owned by J H Realty, Inc. and The Hofgesang Foundation and located south of Lee's Lane and north of Mill Creek cutoff. Said drums are leaking their contents onto the ground and into the water and are causing a condition or circumstances which is or may be hazardous to the health and welfare of the citizens of this Commonwealth and is likely to result in damage to the natural resources of this Commonwealth. If said circumstances or conditions are not alleviated immediately, there will exist a substantial likelihood that the interests

of the state may be prejudiced, more specifically it appears that:

(1) Certain substances, i.e. aromatic and petroleum hydrocarbons being hazardous by virtue of having flash points at or below 140 degrees Fahrenheit, are present at the site;

(2) Those substances are toxic or hazardous within the meaning of KRS Chapter 224;

(3) Certain unknown substances are emitting fumes and leaking from decomposing barrels in random positions at the site and escaping from the site into the Ohio River;

(4) The drums are in danger of being carried away by the waters of the Ohio River creating a hazard to shipping and other users of the waterway;

(5) The public drinking water supply of cities along the banks of the Ohio River and downstream from the site, may be contaminated in the future unless the substances are removed promptly and disposed of in accordance with the law;

(6) No precautions appear to have been taken nor are being taken to adequately protect either the waters of the Commonwealth or public drinking water supplies;

(7) No precautions appear to have been taken to prevent the drums from becoming a hazard to shipping or other users of the Ohio River; and

(8) Ordinary care is not being exercised to protect the barrels or the former landfill site from the detrimental and degrading effects of the elements or flooding by the Ohio River.

WHEREFORE, it is hereby ordered, that J H Realty, Inc. and The Hofgesang Foundation, Inc. shall alleviate those conditions set out above and more specifically shall perform those measures listed below which are designed to reduce the likelihood of further degradation or threat of harm:

(1) Immediately take such remedial action as is necessary to prevent any rise in the Ohio River from carrying the drums on the site from their present position;

(2) Move the drums to a site approved by the Department to prevent further or potential spillage or other release of the substances as a consequence of exposure to the elements or rise in the level of the Ohio River;

(3) Take such remedial action as may be necessary to prevent further erosion of the former landfill site in order to prevent additional drums from being exposed to the elements;

(4) Immediately prepare and transmit to the Secretary of the Department for Natural Resources and Environmental Protection a plan of action which complies with the above described requirements and which encompass at least the following measures:

- (a) Identification of the contents of all barrels by a competent laboratory facility.
- (b) Repackaging of leaking or damaged drums in approved containers.
- (c) Labeling or relabeling of drums in accordance with analytical results.
- (d) Transport by lawful means to a departmentally approved or permitted location, those identified

substances, empty drums or contaminated materials for disposal, recycling, resource recovery or other approved action.

- (e) Disposal of all substances, containers, and contaminated materials in a lawful manner.

You are hereby further notified that a hearing is scheduled for 10 a.m., on the 11 day of April, 1980, in the Secretary's Conference Room, Fifth Floor, Capital Plaza Tower, Frankfort, Kentucky.

This hearing is scheduled in conformance with KRS 224.071 to afford you an opportunity to be heard, if you so desire, and to present proof that such activities do not violate the provisions of KRS Chapter 224 and the regulations promulgated pursuant thereto, and that such conditions do not pose a threat to the health and welfare of the citizens of the Commonwealth or have resulted in or are likely to result in damage to the natural resources of the Commonwealth.

You are further advised that this Order has the full force and effect of law, and that failure to timely obey the directions set forth herein in a timely manner shall result in the Department seeking appropriate relief in a court of law. Any motions, pleadings, responses or other documents may be filed with the Department for Natural Resources and Environmental Protection by mailing such documents to Caroline Chadwell, Docket Coordinator, Fifth Floor, Capital Plaza Tower, Frankfort, Kentucky 40601.

This Order is issued on this 2 day of April,
1980.

Jackie Swigart
JACKIE SWIGART, SECRETARY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

CERTIFICATE

I hereby certify that the Honorable John Y. Brown,
Jr., Governor of the Commonwealth of Kentucky, was notified
of the issuance of this Order to Abate and Alleviate, as required
by KRS 224.071, this 2 day of April, 1980.

Jackie Swigart
JACKIE SWIGART, SECRETARY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

CERTIFICATE

I hereby certify that a true and correct copy of the
foregoing Order to Abate and Alleviate has been served upon
J H Realty, Inc., 209 South Fifth Street, Louisville, Kentucky
40202 and Ben B. Hardy, Hofgesang Foundation, Inc., 209 South
Fifth Street, Louisville, Kentucky 40202.

Jackie Swigart
JACKIE SWIGART, SECRETARY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

FILED

MAY 6 1980

GENERAL COUNSEL
DNREP

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

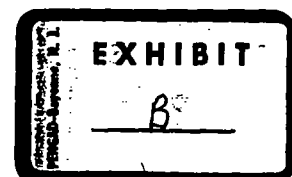
IN THE MATTER OF: The Lee's Lane Landfill Area
Lee's Lane
Jefferson County, Kentucky

REPORT OF HEARING OFFICER

* * * * *

A hearing was conducted in the above styled matter on April 11, 1980. The hearing was held pursuant to KRS 224.071 for the purpose of affording the Respondent the opportunity to be heard and present proof that an Order to Abate and Alleviate entered against the Respondent by the Secretary of the Department for Natural Resources and Environmental Protection on April 2, 1980 was not based on a condition or activity which violated the provisions of Chapter 224.

The Order to Abate and Alleviate entered on April 2 by the Secretary included findings that numerous 55 gallon drums of chemical waste material had been discovered by the Department on property owned by J. H. Realty, Inc. and The Hofgesang Foundation which is located in Jefferson County, Kentucky, south of Lee's Lane and north of the Mill Creek cutoff. The Ohio River forms the western border of the property. The Order to Abate and Alleviate (hereinafter "the Order") also included findings that some of the drums were leaking their contents onto the ground and into the water, thereby causing conditions or circumstances which were or could become



hazardous to the health and welfare of the citizens of the Commonwealth and were likely to result in damage to the natural resources of the Commonwealth. The Secretary further found that if such conditions or circumstances were not alleviated immediately there would exist a substantial likelihood that the interest of the state would be prejudiced. The Order included the following specific findings:

- (1) Certain substances, i.e. aromatic and petroleum hydrocarbons being hazardous by virtue of having flash points at or below 140 degrees Fahrenheit, are present at the site;
- (2) Those substances are toxic or hazardous within the meaning of KRS Chapter 224;
- (3) Certain unknown substances are emitting fumes and leaking from decomposing barrels in random positions at the site and escaping from the site into the Ohio River;
- (4) The drums are in danger of being carried away by the waters of the Ohio River creating a hazard to shipping and other users of the waterway;
- (5) The public drinking water supply of cities along the banks of the Ohio River and downstream from the site, may be contaminated in the future unless the substances are removed promptly and disposed of in accordance with the law;
- (6) No precautions appear to have been taken nor are being taken to adequately protect either the waters of the Commonwealth or public drinking water supplies;
- (7) No precautions appear to have been taken to prevent the drums from becoming a hazard to shipping or other users of the Ohio River; and
- (8) Ordinary care is not being exercised to protect the barrels or the former landfill site from the detrimental and degrading effects of the elements or flooding by the Ohio River.

KRS 224.071 provides that "as soon as possible after the entry of the order to abate and alleviate the Secretary shall provide the person or combinations of person an opportunity to be heard and to present proof that such conditions or activity does not violate the provisions of the sections." Hon. Ben B. Hardy appeared on behalf of the Respondents at the April 11, 1980 hearing, but chose to offer no proof whatever that the conditions complained of in the Secretary's Order to Abate and Alleviate did not exist.

The Department on the other hand introduced corroborative evidence in support of each of the claims and findings set forth in the Order to Abate and Alleviate. The Department's evidence showed that between 350 to 500 barrels were located on the surface of the subject site and that well over half of them were not empty. Many barrels were punctured and liquids were observed leaking from some barrels. Others swelled from apparent pressure from within. Witnesses estimated that some of the barrels were located within 10 vertical feet of the level of the Ohio River on the date the inspections were made. Photographs introduced into evidence by the Department demonstrate the alarming proximity of the barrels to the shoreline. There was also evidence that children play on the site and that homes are located within one-half mile of the site. Some of the punctured barrels appeared to have been punctured by being shot with firearms. Considering the content proved for some of the drums, it is apparent that the health and welfare of the citizens who shot these barrels were, as well as the citizens who might later shoot the barrels, is in jeopardy.

A random sampling of the contents of the barrels revealed that a significant number of them contain hazardous wastes as defined by 401 KAR 2:051 E (2). Laboratory tests performed on samples taken from the barrels demonstrated that many contained "ignitive wastes" as defined by 401 KAR 2:051 E (2)(C). In addition, test results show that some of the barrels contain the following substances which are "hazardous wastes" within the meaning of applicable regulations: waste non-halogenated solvents; benzene; 2,4-dimethylphenol; ethylbenzene; and toluene. This list is not comprehensive. Rather, it lists only those hazardous wastes identified by the taking of random samples.

CONCLUSION

It is apparent that the Lee's Lane Landfill presents a danger to the health and welfare of the people of the Commonwealth and the conditions thereon are likely to result in damage to the natural resources to this state. The Department made this claim in its Order to Abate and Alleviate. It corroborated these claims with evidence at the hearing. The purpose of the April 11, 1980 hearing was to afford the Respondent an opportunity to show that the conditions alleged to exist by the Department did not in fact exist and that the dangers alleged by the Department were not really dangerous. The Respondent introduced no evidence whatever at the hearing. It is apparent that the remedial actions ordered in the Secretary's Order to Abate and Alleviate are appropriate. The urgency of the need for the Respondents to take the remedial actions ordered by the Secretary were effectively dramatized by the evidence

at the April 11 hearing. In the event that the Respondent fails or refuses to comply with the order to take remedial actions in the original order to abate and alleviate, the Department should immediately pursue remedies against the Respondents available under KRS 224.996(5) and other relevant statutes.

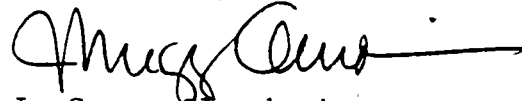
FINDINGS OF FACT

1. The Lee's Lane Landfill area which is the subject of this action adjoins the Ohio River on one border.
2. 350 to 500 55 gallon barrels are situated on the surface of the subject site.
3. Random sampling of the contents of those barrels which were not empty revealed that some of the barrels contained waste non-halogenated solvents, benzene, 2,4-dimethylphenol, ethylbenzene and toluene.
4. A residential area is located within the immediate vicinity of the landfill area and children have been observed playing among the exposed barrels.
5. The above described conditions present a danger to the health and welfare of the people of the state and is likely to result in damage to natural resources including but not limited to the Ohio River.
6. The Respondents did not introduce any evidence that the above described conditions do not exist.

CONCLUSIONS OF LAW

1. The Order to Abate and Alleviate issued by the Secretary of the Department for Natural Resources and Environmental Protection against the Lee's Lane Landfill area in Jefferson County, Kentucky, on April 2, 1980 was properly issued pursuant to KRS 224.071 and should remain in full force and effect.

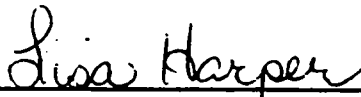
Respectfully submitted,



J. Gregg Clendenin
HEARING OFFICER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Report of Hearing Officer has been served by certified mail upon J H Realty, Inc., 209 South Fifth Street, Louisville, Kentucky 40202; Ben B. Hardy, Hofgesang Foundation, Inc., 209 South Fifth Street, Louisville, Kentucky 40202; and to Hon. Jackie Swigart, Secretary for the Department for Natural Resources and Environmental Protection, Fifth Floor, Capital Plaza Towers, Frankfort, Kentucky 40601, this the 5th day of May, 1980.



COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

FILED

JUN 13 1980

GENERAL COUNSEL
DNREP

IN THE MATTER OF:

The Lee's Lane Landfill Area
Lee's Lane
Jefferson County, Kentucky

ORDER

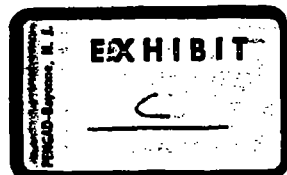
* * * * *

A hearing having been held in the above-styled matter,
the Hearing Officer having filed his Report and the Secretary
being otherwise sufficiently advised,

It is hereby ORDERED AND ADJUDGED that the Order to Abate
and Alleviate entered on April 2, 1980, against the Lee's
Lane Landfill Area in Jefferson County, Kentucky, shall remain
in full force and effect.

Entered this 12 day of June, 1980.

Jackie Suggs
Secretary



CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing ORDER were mailed certified mail to the following this the 13th day of June, 1980:

Hon. Ben B. Hardy
209 South Fifth Street
Room 400
Louisville, Kentucky 40202

Hon. J. Gregg Clendenin
217 North Upper Street
Lexington, Kentucky 40507

Hon. Ronald R. VanStockum, Jr.
Department for Natural Resources
and Environmental Protection
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

Caroline Chadwell
Caroline Chadwell
Docket coordinator

DISTRIBUTION:

Jack Wilson, Commissioner
Environmental Protection

Roger Blair, HMWM
CHRISTIE Harrington, HMWM
Margie Woodrum

FRANKLIN CIRCUIT COURT
CIVIL ACTION NO.
DIVISION NO.

DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

FILED PLAINTIFF

VS.

COMPLAINT

AUG - 3 1990

J. H. REALTY, INC.

JAMES E. COLLINS
CLERK OF COURT DEFENDANT

SERVE: Ben B. Hardy
209 South Fifth Street
Louisville, Kentucky 40202

THE HOFGESANG FOUNDATION, INC.

DEFENDANT

SERVE: Ben B. Hardy
209 Sixth Fifth Street
Louisville, Kentucky 40402

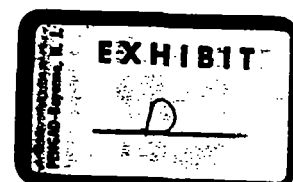
* * * * *

Comes the Plaintiff, the Department for Natural Resources and Environmental Protection, by counsel, and upon information and belief, states for its Complaint as follows:

(1) THAT the Defendant, J. H. Realty, Inc., hereinafter referred to as J. H., is a corporation registered with and doing business in the Commonwealth of Kentucky.

(2) THAT the Defendant, the Hofgesang Foundation, Inc., hereinafter referred to as Hofgesang, is a corporation registered with and doing business in the Commonwealth of Kentucky.

(3) THAT the Plaintiff is charged with the duty of enforcing the laws of the Commonwealth, as set forth in KRS.



Chapter 224 and the rules and regulations promulgated pursuant thereto relating to the proper disposal of hazardous waste in the Commonwealth.

(4) THAT on April 2, 1980, the Secretary of the Department for Natural Resources and Environmental Protection, issued an Order to Abate and Alleviate conditions surrounding the disposal of barrels of hazardous waste on property owned by the Defendants, such conditions constituting violations of KRS 224. Such Order is attached hereto and incorporated by reference as Plaintiff's Exhibit No. 1.

(5) THAT on April 11, 1980, a hearing was held pursuant to KRS 224.071 at which time the Department presented evidence substantiating the conditions which caused the above-mentioned Order to Abate and Alleviate to be issued.

(6) THAT on June 12, 1980, the Secretary of the Department for Natural Resources and Environmental Protection issued an Order pertaining to the above-mentioned hearing stating that the Order to Abate and Alleviate shall remain in full force and effect. Such Order is attached as Department's Exhibit No. 2.

(7) THAT the Defendants have failed to perfect an appeal of the June 12, 1980 Order of the Secretary pursuant to KRS 224.085 and accordingly the June 12, 1980 Order is final and enforceable by this Court.

(8) THAT the Defendant's have failed to abate and alleviate the conditions surrounding the disposal of barrels of hazardous waste on its property as ordered by the Secretary

and to the best of Plaintiffs knowledge has failed to act in any fashion to remedy those conditions.

(9) THAT as a result of the failure of the Defendants to act pursuant to the above-mentioned orders of the Department, the Defendants have maintained a hazardous condition on the site in question.

(10) THAT the Defendants should be ordered by this Court to take whatever affirmative actions are necessary to comply with the above-mentioned orders of the Department.

WHEREFORE, the Plaintiffs respectfully demands as follows:

(1) THAT the Defendants J. H. Realty, Inc. and the Hofgesang Foundation, Inc., be adjudged in violation of the Order to Abate and Alleviate issued by the Department on April 2, 1980, and the Order of the Department issued on June 12, 1980.

(2) THAT the Defendants, J. H. Realty, Inc., and the Hofgesang Foundation, Inc., each be assessed \$1,000 for each day that the Defendants have and continue to violate the two orders referred to in paragraph number one immediately above, pursuant to KRS 224.994(2).

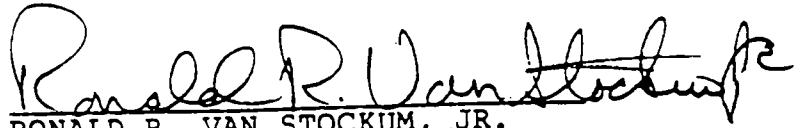
(3) THAT the Defendants J. H. Realty, Inc., and the Hofgesang Foundation, Inc., be ordered by this Court to take whatever steps are necessary to comply with the two orders of the Department referred to immediately above in paragraph one.

(4) THAT the June 12, 1980 order of the Department

be affirmed.

(5) THAT the Plaintiff be awarded its costs herein expended, and all other relief to which it is entitled.

DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION



RONALD R. VAN STOCKUM, JR.
Office of General Counsel
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

COUNSEL FOR PLAINTIFF

C-79-060
9-79

Commonwealth of Kentucky
Department of Justice



CERTIFICATION
OF COURT RECORDS

Case No. 80-CI-1583

County FRANKLIN

Court CIRCUIT

DEPARTMENT FOR NATURAL RESOURCES

-v-

J. H. REALTY, INC., AND THE HOFGESANG FOUNDATION, INC.

RECEIVED

JAN 20 1981

OFFICE OF
GENERAL COUNSEL

I, EUNICE MOORE Clerk of the CIRCUIT Court,

do certify that the following are true and correct copy(s) of the
ORDER

as recorded in the Office of the Circuit Clerk of FRANKLIN County.

In TESTIMONY WHEREOF witness my hand as Clerk aforesaid, this the

19 day of January, 1981

EUNICE MOORE

Clerk

By: [Signature]

D.C.

EXHIBIT

FRANKLIN CIRCUIT COURT
NO. 80-CI-1583

DEPARTMENT FOR NATURAL
RESOURCES AND ENVIRONMENTAL
PROTECTION

PLAINTIFF

VS.

ORDER

J. H. REALTY, INC.

AND

THE HOFGESANG FOUNDATION, INC.

FILED

JAN 19 1981

DEFENDANTS
JAMES E. COLLINS
CLERK FRANKLIN CIRCUIT COURT

* * * * *

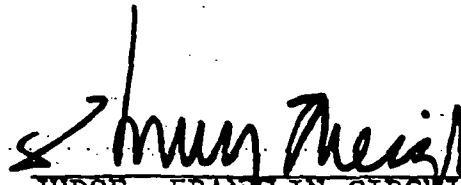
This matter having come on before the Court for a hearing on Plaintiff's Motion for Summary Judgment and the Court having heard arguments of counsel and being otherwise sufficiently advised, it is hereby ORDERED and ADJUDGED as follows:

1. The Secretary's Order of June 12, 1980 became final and was not appealed 30 days after entry, and hence the court lacks jurisdiction of the subject-matter; accordingly, plaintiff's Motion for Summary Judgment is hereby sustained.
2. The Order of the Secretary dated June 12, 1980, is hereby affirmed and adopted as the Order of this Court.

3. Defendants are hereby granted ninety (90) days in which to comply with and implement those provisions and directives as set forth in the Order to Abate and Alleviate dated April 2, 1980, as adopted by the Secretary in the Order of June 12, 1980, and by this Court herein.

4. Defendants, upon timely application within the aforesaid ninety (90) day period, may request of this Court a reasonable extension of time within which to comply with the terms of this Order.

This 19 day of January, 1981.


JUDGE, FRANKLIN CIRCUIT COURT
DIVISION I

Copies to:

Hon. Ben B. Hardy
209 South Fifth Room 400
Louisville, Kentucky 40202

Hon. Ronald R. Van Stockum, Jr.
Office of General Counsel
Department for Natural Resources
and Environmental Protection
Capital Plaza Tower
Frankfort, Kentucky 40601